No. 12,881

IN THE

United States Court of Appeals
For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, *Appellant,* vs. COMMISSIONER OF INTERNAL REVENUE, *Appellee.*	

APPELLANT'S REPLY BRIEF.

GEORGE H. KOSTER,
300 Montgomery Street, San Francisco 4, California,
Attorney for Appellant.

BAYLEY KOHLMEIER,
300 Montgomery Street, San Francisco 4, California,
Of Counsel.

No. 12,881

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

APPELLANT'S REPLY BRIEF.

The Commissioner of Internal Revenue, the Respondent or Appellee in this case, insists in his brief that this case is essentially a question of fact and that The Tax Court cannot be reversed unless its conclusions as to the facts are "clearly erroneous" (Br. p. 18). He argues that The Tax Court's conclusions are clearly right and that the taxpayer did not sustain a loss on the sale of its property, and The Tax Court's decision therefore should be sustained (Br. p. 19). He also argues that tax-savings was the motive for making the sale (Br. p. 22) and that a transaction so motivated should be disregarded as having no real

Table of Authorities Cited

Cases

Codes

No. 12,881

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, *Appellant,* vs. COMMISSIONER OF INTERNAL REVENUE, *Appellee.*	

APPELLANT'S REPLY BRIEF.

The Commissioner of Internal Revenue, the Respondent or Appellee in this case, insists in his brief that this case is essentially a question of fact and that The Tax Court cannot be reversed unless its conclusions as to the facts are "clearly erroneous" (Br. p. 18). He argues that The Tax Court's conclusions are clearly right and that the taxpayer did not sustain a loss on the sale of its property, and The Tax Court's decision therefore should be sustained (Br. p. 19). He also argues that tax-savings was the motive for making the sale (Br. p. 22) and that a transaction so motivated should be disregarded as having no real

business purpose and not bona fide, and therefore The Tax Court decision is correct.

If there is a sale of property, a loss is sustained when the selling price is less than the cost (Int. Rev. Code, Sec. 112(a) and 111(a)). In this case it is stipulated that the selling price was less than cost, so there is no merit to the Government's argument that no loss was sustained. The loss is deductible unless the sale transaction can be disregarded as The Tax Court concluded, as not being a bona fide sale.

The Tax Court said the sale of the property was not bona fide. As Appellant pointed out in its Opening Brief (pp. 17-38), there is no justification in fact or law or judicial authority for this conclusion. To support such a conclusion it must be shown that the sale was made solely for tax-saving purposes, and there is absolutely nothing in the record from which such a showing can be made. The stipulation shows that a tax reduction resulted from the loss but it does not show that the sale was made for the purpose of obtaining the tax reduction (Op. Br. p. 20-25).[1] The sole

[1]The loss results in an immediate tax reduction of approximately $180,000.00, (40% of claimed loss of $464,811.68). This is not an extraordinarily large amount when compared with the Bank's tax liability for 1943 of $6,041,163.77 (R. 23), and it is not a true "saving". The basis of the property to Merchants is the price which it paid for the property so its basis for depreciation and for computing gain or loss on subsequent sale is lower than the basis that the property had in the hands of the Bank. It might very well turn out that the transaction will result in a greater tax rather than a tax saving. This point was emphasized by the Court of Appeals for the 2nd Circuit in *Commissioner vs. Behan* (1937) 90 F(2d) 609, in commenting upon whether a tax reduction from a transaction in which a new basis is established can be considered a tax savings.

purpose of the sale was the settlement of the controversy with the Comptroller.

There is an inclination on the part of the Government to belittle the seriousness of the controversy with the Comptroller. We did not want to fill the record with the entire story about that controversy but the record indicates that there were other matters involved (the reference to the settlement of the bank premises valuation issue being referred to as "paragraph 5 of Requirements of the Comptroller" (R. 61-63)), and that the settlement of the controversy had been the subject of "extended negotiations" (R. 66), and that the Bank was extremely concerned about protecting its position and the principles it was advocating in the controversy. Whether the Bank's position in this controversy with the Comptroller was tenable, or whether its insistence on avoiding any move which could be referred to as a precedent detrimental to its interests would afford legal protection in the future, is immaterial to the consideration of this case. What is material and important, is the fact that the Bank had decided that such action was imperative for its protection, and was willing to go to the trouble and expense of making the sales involved in this case to carry out this decision. The sole purpose of these sales was to carry out this decision and the stipulation so provides. This must be recognized as a real business purpose as the Bank intended it to be. The Government's brief does not refute this conclusion.

In the very recent case of *Rollingwood Corp. vs. Commissioner,* No. 12728, June 21, 1951, this Court stated: "Rule 52(a) of the Federal Rules of Civil Procedure is plain in its requirements that findings of fact shall not be set aside unless clearly erroneous. It is true that where the facts are not in dispute this Court may draw inferences of its own. But the ultimate question is whether the findings are supported by the record," and the Court proceeded to show how the record established the fact as found by The Tax Court that certain houses were held for the purpose of sale. The stipulated facts supported such a finding. In this case, however, the stipulated facts contain the stipulation that the purpose of the sale transaction was to effect a settlement of the controversy with the Comptroller (Op. Br. p. 20-25), so any finding that the sale was made for the sole purpose of saving taxes would be in direct conflict with the stipulated facts and therefore "clearly erroneous," and without such a finding The Tax Court's decision in this case cannot be sustained (Op. Br. p. 8-14).

In the opening brief we pointed out that once the sale is recognized as bona fide the deductibility of the loss cannot be affected by the sale of the property by Capital Company to Merchants (Op. Br. p. 58-67). The cases cited by the Commissioner to support a position contrary to this conclusion have been analyzed in the Appellant's opening brief. (*Shoenberg vs. Commissioner, Commissioner vs. Dyer, Rand vs. Helvering,* Op. Br. 59; and the *Foster vs. Commis-*

sioner and *DuPont vs. Commissioner,* are in principle the same as the other cases involving sales between family members and reacquisition of the property originally sold where the transaction when originally made involved an agreement to repurchase). In all those cases there was no other motive for the sale than tax reduction and the repurchase agreement was an essential part of the transaction. That is not the kind of a case now before this Court.

If the sale from Capital Company to Merchants had been a necessary incident to accomplish the Bank's purpose in making the sale to Capital Company, the arrangement for the later sale might have justified a disregard of the intermediary transaction, but in this case it was the sale from the Bank to Capital Company which was necessary for the accomplishment of the Bank's purpose, the meeting of the Comptroller's requirement, and the sale from Capital Company to Merchants had no relationship whatever to that objective (Op. Br. p. 47-58). The sale from the Bank to Capital Company stands by itself and must be considered as a single bona fide transaction (*J. Harold Frantz,* BTA Memo, and *Bancitaly Corp.,* cited p. 60 of Op. Br.). In that light, the sale to Capital Company must be recognized and the loss resulting therefrom must be allowed, and the decision of The Tax Court should be reversed.

The Commissioner takes issue with our interpretation of the *National Carbide Corp. vs. Commissioner* case, 336 U. S. 412 (Op. Br. App. vi). We argued

that under this case affiliated companies had to be recognized as separate taxpayers regardless of their close relationship and the domination and control of one over the other. We pointed out that so long as the separate corporate entities must be recognized the usual incidents of taxation are applicable even as to transactions between them. In this case the Supreme Court in referring to the case of *Southern Pacific Co. vs. Lowe,* 247 U. S. 330 stated:

> "It is thus clear beyond doubt that the subsidiary was not referred to as an agent of the parent in the usual or technical sense. 'Agency' and 'practical identity,' as those words are used in the *Southern Pacific* case, are unquestionably opposite sides of the same coin. The close relationship between corporations because of complete ownership and control of one by the other was the basis for the result reached, whatever its articulation.
>
> "That basis has been repudiated by subsequent decisions of this Court. Whatever the vitality of *Southern Pacific Co. v. Lowe* on its special facts, we have held that a corporation formed or operated for business purposes must share the tax burden despite substantial identity, in practical operation, with its owner. Complete ownership of the corporation, and the control primarily dependent upon such ownership—the important ingredients of the Southern Pacific case—are no longer of significance in determining taxability. *Moline Properties, Inc., v. Commissioner,* supra; *Burnet v. Commonwealth Improvement Co.,* 1932, 287 U. S. 415, 53 S.Ct. 198, 77 L.Ed. 399.
>
> "In both of the cases last cited, the agency argument now urged upon us was made and re-

> jected. In both cases, *Southern Pacific Co. v. Lowe,* supra, was relied upon by the taxpayers. In both, we found that the contention that the corporation was the agent of its owner was simply the argument that the subsidiary had no corporate identity distinct from its stockholders in a different form. * * *"

On the basis of the *National Carbide Corp.* case, we argued that the Bank, Capital Company and Merchants must be recognized as separate corporate entities and separate taxpayers, and that the acquisition of property by Merchants whether it be from Capital Company or from the Bank is a transaction which involves a tax incident upon the seller—the determination of whether the seller realized a gain or loss from the sale, that the impact of this incident cannot be avoided by the fact that the Bank as parent had dominion and control over Merchants, its subsidiary. We believe we are correct in our argument that if the sale involved in this case is construed as a sale from the Bank to Merchants, the loss suffered by the Bank, that is the difference between the selling price and the cost of the property, must be allowed as a deduction because the only ground on which the deduction could be denied is that the separate corporate identity of the Bank and of Merchants is to be disregarded which is directly contrary to the principle expressed by the Supreme Court in the *National Carbide Corp.* case.

It is respectfully submitted that for the reasons advanced in Appellant's Opening Brief and in this

Brief, The Tax Court erred in its decision in this case and its decision should be reversed.

Dated, San Francisco, California,
July 25, 1951.

George H. Koster,
Attorney for Appellant.

Bayley Kohlmeier,
Of Counsel.